



# News & Case Notes

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**BOARD NEWS**

## Biennial Review/Attorney Fees/"388(4)"

The Board has scheduled a public meeting for the Members to discuss responses received regarding the Board's invitation for written comments concerning its biennial review of attorney fee schedules under ORS 656.388(4). Additional written comments and public testimony will also be considered. Any responses received up to one day before the meeting will be posted to the Board's website prior to the meeting.

The Board meeting has been scheduled for March 7, 2023, at the Board's Salem office (2601 25<sup>th</sup> St. SE), at 10 a.m. In addition to reviewing the submitted comments, the Members will consider testimony and other written comments presented at, or in advance of, the meeting. Those written comments should be directed to Katy Gunville, WCB's Executive Assistant, at 2601 25<sup>th</sup> St. SE, Ste. 150, Salem, OR 97302, [katy.e.gunville@wcb.oregon.gov](mailto:katy.e.gunville@wcb.oregon.gov), or via fax at (503 )373-1684. The public will also be able to participate in the meeting by means of a "phone conference" link.

A formal announcement regarding the Board meeting will be electronically distributed to anyone who has registered for these notifications at <https://service.govdelivery.com/accounts/ORDCBS/subscriber/new>.

## Administrative Law Judge Recruitment

The Workers' Compensation Board intends to fill two Administrative Law Judge positions in the Salem Hearings Division. The positions involve conducting workers' compensation and OR-OSHA contested case hearings, making evidentiary and other procedural rulings, conducting mediations, analyzing complex medical, legal, and factual issues, and issuing written decisions which include findings of fact and conclusions of law.

Applicants must be members in good standing of the Oregon State Bar or the Bar of the highest court of record in any other state or currently admitted to practice before the federal courts in the District of Columbia. The position requires periodic travel, including but not limited to Eugene, Roseburg, and Ontario, and working irregular hours. The successful candidate will have a valid driver's license and a satisfactory driving record. Employment will be contingent upon the passing of a fingerprint-based criminal background check.

The announcement is posted on the Department of Consumer and Business Services (DCBS) website at <https://www.oregon.gov/dcbs/jobs/Pages/jobs.aspx> and contains additional information about compensation and benefits of the position and how to apply.

Questions regarding the position should be directed to Ms. Kerry Anderson at (503)934-0104. The close date for receipt of application materials is March

15, 2023. DCBS is an Equal Opportunity, Affirmative Action employer committed to workforce diversity.

## Staff Attorney Recruitment

WCB will soon be recruiting for a staff attorney position. The key criteria includes a law degree and extensive experience reviewing case records, performing legal research, and writing legal arguments or proposed orders. Excellent research, writing, and communication skills are essential. Preference may be given for legal experience in the area of workers' compensation.

The recruitment is scheduled to begin on February 15, 2023 and will run through March 13, 2023. Further details about the position and information on how to apply will soon be available online at [https://oregon.wd5.myworkday.com/SOR\\_External\\_Career\\_Site](https://oregon.wd5.myworkday.com/SOR_External_Career_Site). WCB is an equal opportunity employer.

## Office Manager Recruitment

The Workers' Compensation Board intends to fill one position for a Hearings Division Program Support Manager (Legal Support Services Supervisor 2) in the Salem or Portland Hearings Division. The position serves as the Hearings Division Program Support Manager with direct supervision of twelve Judicial Assistants and four Office Specialists 2s staffed in Portland, Salem, Eugene, and Medford offices. The position is responsible for developing, planning, analyzing, coordinating, and implementing program projects and for overseeing daily management of facility issues and office operations involving the Portland, Salem, Eugene, and Medford Hearings Divisions locations. This position works in conjunction, when appropriate, with WCB's Administrative Services Division Manager. The position requires periodic travel, including but not limited to Eugene, Roseburg, and Ontario, and working irregular hours. The successful candidate will have a valid driver's license and a satisfactory driving record. Employment will be contingent upon the passing of a fingerprint-based criminal background check. The announcement can be found on the Department of Consumer and Business Services (DCBS) website at <https://www.oregon.gov/dcbs/jobs/Pages/jobs.aspx> and contains additional information about compensation and benefits of the position and how to apply. Questions regarding the position should be directed to Ms. Kerry Anderson at (503) 934-0104. The close date for receipt of application materials is February 28, 2023. DCBS is an Equal Opportunity, Affirmative Action Employer Committed to Workforce Diversity.

## Attorney Fee Statistical Report Published

The Workers' Compensation Board (WCB) published its annual update of statistical information regarding attorney fees on January 19, 2023. The report includes attorney fee data through year-end 2021, and can be found on the WCB statistical reports webpage using this link: <https://www.oregon.gov/wcb/Documents/statisticalrpts/011923-atty-fee-stats.pdf>

**CASE NOTES**

## Medical Opinion: Occupational Disease for Bilateral Foot Conditions Compensable; Contrary Opinion Not Based on Complete History or Sufficiently Explained

*Michael Luce Sr.*, 75 Van Natta 2 (January 6, 2023). Applying ORS 656.266(1) and ORS 656.802(2)(a), the Board held that the record persuasively established that the claimant's occupational disease claim for bilateral foot conditions was compensable. The carrier argued that the record did not support compensability based on an occupational medicine physician's opinion that the major contributing cause of the claimant's disease was not work, but, rather, obesity and extensive walking outside of work. However, the Board was not persuaded by the occupational medicine physician's opinion. Specifically, the Board stated that the physician did not have a complete understanding of the claimant's walking or symptoms. In addition, the Board noted that the physician did not sufficiently explain how the claimant's weight and walking contributed more than his work activities. Finally, the Board discounted the occupational medicine physician's opinion because he concurred with another physician's opinion that was unpersuasive. Accordingly, the Board set aside the carrier's denial.

*Board not persuaded that claimant's obesity and extensive off-work walking were the major cause of bilateral foot conditions.*

## Compensability: Claimant Met Initial "Material Cause" Burden; Contrary Opinion Primarily Focused on Whether Claimant Had Findings That Established a Particular Diagnosis; Carrier Did Not Meet Further Burden Under ORS 656.266(2)(a) Due to Inadequate "Weighing"

*Michelle Miller*, 75 Van Natta 18 (January 18, 2023). Applying ORS 656.005(7)(a) and ORS 656.266(1), as well as ORS 656.005(7)(a)(B) and ORS 656.266(2)(a), the Board reversed an ALJ's order that upheld the carrier's denial of claimant's injury claim for a back condition. In doing so, the Board found that the persuasive medical opinion evidence supported a conclusion that claimant's work injury was a material contributing cause of her need for treatment of her back condition. ORS 656.005(7)(a); ORS 656.266(1); *Albany Gen. Hosp. v. Gasperino*, 113 Or App 411, 415 (1992). Specifically, one of the providers supporting compensability treated claimant close in time to the injury event. See *Anthony A. Miner*, 62 Van Natta 2538, 2540 (2010). Moreover, those medical opinions took claimant's particular circumstances into consideration and were well reasoned. See *Somers v. SAIF*, 77 Or App 259, 263 (1986). The Board discounted a contrary medical opinion as it primarily focused on whether claimant had findings that established a particular diagnosis (*i.e.*, a back strain), rather than whether claimant's work injury was a material cause of her need for treatment. See *KMart v. Evenson*, 167 Or App 46, 49-50 (2000) (the existence of a particular disease or diagnosis is not necessarily required to prove the existence of a "compensable injury" under ORS 656.005(7)(a)).

*Opinion found persuasive due in part to physician's treating claimant close in time to the injury.*

Having found that claimant met her burden of proving initial compensability, the Board turned to the carrier's burden to establish that an "otherwise compensable injury" combined with a statutory "preexisting condition," and that the "otherwise compensable injury" was not the major contributing cause of claimant's disability or need for treatment of the combined condition. See ORS 656.005(7)(a)(B); ORS 656.266(2)(a); *SAIF v. Kollias*, 233 Or App 499, 505 (2010). The Board discounted the only medical opinion that purported to support the carrier's burden of proof. Specifically, the Board found that the medical opinion did not adequately weigh claimant's "otherwise compensable injury" in reaching a conclusion regarding the major contributing cause of claimant's need for treatment for a "combined condition." See *Cummings v. SAIF*, 197 Or App 312, 318 (2005) (quoting *Dietz v. Ramuda*, 130 Or App 397, 401 (1994), *rev dismissed*, 321 Or 416 (1995) (the assessment of the major contributing cause of the disability or need for treatment of a combined condition requires a comparison of the relative contribution of the preexisting condition and the work-related condition).

### Jurisdiction: Board Lacks Jurisdiction Over Request for Hearing Seeking Penalties Related to IMEs Under ORS 656.325(6) Where Claimant Did Not First Seek Relief from WCD; No "Matter Concerning a Claim" Presented

*James Hibbs*, 75 Van Natta 27 (January 18, 2023). Applying ORS 656.283(1), ORS 656.325(1)(a), and ORS 656.704(1), (3)(a), the Board held that it did not have jurisdiction to address the claimant's request for the assessment of penalties and penalty-related attorney fees for the employer's allegedly unreasonable claims processing. In doing so, the Board determined that ORS 656.325(6) did not vest the Hearings Division or the Board with jurisdiction to resolve the matter because the claimant had not first sought relief from the Workers' Compensation Division (WCD). See ORS 656.325(1)(a); *Earl M. Binger*, 63 Van Natta 1940, 1941 (2011); *Roberta L. Jones-Lapeyr*, 58 Van Natta 2202, 2205 (2006). Additionally, the claimant's request for relief did not involve a "matter concerning a claim." Thus, the WCD had the exclusive jurisdiction to resolve the dispute. See ORS 656.704(2)(a); OAR 436-060-0008(3). Accordingly, the Board dismissed the claimant's hearing request and transferred the matter to the WCD. See ORS 656.704(5); *Harry L. Rumer*, 69 Van Natta 536, 539-40 (2017).

*WCD had the exclusive jurisdiction to resolve the dispute.*

### Extent: Claimant Proved Entitlement to "Class 1" Brain Impairment - Medical Arbiter Persuasive

*Robert Chase*, 75 Van Natta 39 (January 27, 2023). Applying OAR 436-035-0007, OAR 436-035-0013(1), and *Marvin Wood Products v. Callow*, 171 Or App 175, 183-84 (2000), the Board affirmed an Order on Reconsideration that awarded claimant a 10 percent whole person impairment award based on the medical arbiter's opinion. In doing so, the Board concluded that the medical arbiter's opinion that claimant had a Class 1 "brain impairment" due to the

*Arbiter sufficiently weighed other potential causes of claimant's impairment.*

accepted post-concussive syndrome was consistent with the criteria for such an impairment set forth in OAR 438-035-0390(10) and had sufficiently weighed other potential causes of claimant's impairment. Accordingly, the Board held that the record established claimant's entitlement to a 10 percent impairment award for the Class 1 "brain injury" and did not establish error in the reconsideration process.

Member Curey dissented, concluding that the carrier had established error in the reconsideration process. Finding the medical arbiter's opinion to be ambiguous, Member Curey concluded that another physician's opinion, with which the attending physician concurred, was more accurate and should have been used to rate impairment. Because that physician's opinion did not support claimant having a Class 1 "brain injury" related to the accepted post-concussive syndrome, Member Curey concluded that claimant was not entitled the 10 percent impairment award granted by the Order on Reconsideration.